

***TESTIMONIUM DE AUDITU* PROOF IN
CONFIRMATION OF MARRIAGE DECISION (*ISBAT NIKAH*)
(Normative Studies to the Decision Number 69/PDT.P/2012/PA.MLG)**

ARTICLE

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ABSTRACT

AYU TUNJUNG WULANDARI, Civil Law, Faculty of Law, University of Brawijaya, *Testimonium De Audit* Proof In confirmation of Marriage Decision (Isbat Nikah) (Normative Studies to The Decision Number 69/Pdt.P/PA.Mlg), Supervisor: Ulfa Azizah, SH, M.Kn. and M. Hisham Syafioedin, S.H; 19 pages.

In this paper the author discusses the issue of proof *testimonium de auditu* in request of '*isbat nikah*'. In Article 171 HIR *de auditu* mentioned that testimony can not be accepted as valid evidence. According to some legal experts testimony *de auditu* not allowed because such information does not relate to events experienced by themselves, so the witness *de auditu* not constitute evidence and need not be considered. However, the determination of the request confirmation of '*isbat nikah*' Number: 69/Pdt.P/2012/PA.Mlg, judge accepted the testimony of *de auditu* as valid evidence through several considerations.

This study aims to identify and analyze the determination of '*isbat nikah*' request Number: 69/Pdt.P/2012/PA.Mlg about proving *testimonium de auditu*. Thus it can be seen why the Malang religious court judge granted the applicant.

This research is a normative juridical approach to the legislation. Therefore this study used type of primary legal materials, secondary, and tertiary obtained from the study of literature. Analytical techniques used in this research is descriptive qualitative techniques.

Based on the results of the study, the authors obtained answers to existing problems. Malang Religious Court judges grant applicants with some considerations on the basis of the applicant's conduct and the confirmation of marriage just to take care of a retired widow. And keep in mind that there are three purposes of the law, justice, expediency, and certainty. In this case Judge emphasizes expediency than other legal purposes, and also for the benefit of the applicant.

The conclusion of this study was largely a general provision of Article 171 HIR is not binding and can be ruled out by considering the extent to which the quality and probative value of the testimony given by the witness *de auditu*.

Researchers suggested that in solving this problem of legal practitioners should not be fixated on formal rules, neglecting the rules of law in society, the rules of religion in other words that the underlying judgment the judge in determining the application for confirmation of marriage is for the benefit of the applicant.

Key word: *testimonium de auditu*, *isbat nikah*

A. Introducing

After the enactment of Law No. 1 of 1974 about marriage, becoming known in the community, especially Muslims, marriages performed by people who are not registered by the Religious Affairs Office (*KUA*). Ceremony of '*akad nikah*' conducted by the groom's family and the bride, not attended by officials of the Ministry of Religious Affairs (*KUA*). Yet it is clear that in article 2, paragraph 1 of Law No. 1 of 1974 marriage was legal, if done according to the laws of each religion or belief. And the provisions of a marriage to the importance of sound on record as paragraph 2 that every marriage recorded in accordance with the legislation in force.

Recording every marriage is the same as recording important events in one's life, such as births, deaths stated in paperwork, an official deed also contained in the records list. In the explanation can be understood that the importance of recording the orderly administration aims to implementation so that no ambiguities in the status of marriage and the marriage have legal protection if a dispute occurs time.

But the fact is happening now is noncompliance by some of the community for marriage or marriage by not keep records as specified in Law no. 1 of 1974, such as '*nikah sirri*'. So it raises the consequences on a person's marital life that is not in accordance with the provisions of applicable or can be called marriage did not obey the law.

For Muslims, the marriage has not been listed as implementation available legal procedures to certify the marriage has not been registered, by applying for '*isbat nikah*' by the applicant. According to *Munasik*, one of the Judges of the Religious Malang said the '*isbat nikah*' is the establishment of religious courts for marriage declared valid and enforceable wedding over the marriage conducted according to Islamic law and are not recorded by the civil registrar marriage (*pegawai Pencatat Nikah*) authorities.¹

In request of '*isbat nikah*' process whereby a judge can judge that the marriage is indeed valid case, namely the verification process. The applicant is expected to bring two witnesses to the trial.

¹ Munasik, interview on 14th November 2012

However, as happened in the case of an application case number 69/Pdt.P/2012/PA.Mlg about '*isbat nikah*' request, the applicant can not provide proof in the form of testimony directly see for themselves the wedding took place, because of the marriage witnesses have died. It has become a problem because of the testimony given in the form testimonium de auditu, which in Article 171 paragraph 1 of HIR and paragraph 1 of Article 1907 Civil Code can not be accepted as evidence. According to some legal experts testimony de auditu not allowed because the statement was not related to the events experienced by themselves, so the witness de auditu not constitute evidence and need not be considered.

But in the case of decision for determination the number 69/Pdt.P/2012/PA.Mlg about '*isbat nikah*' request, Judge accepted the testimony of de auditu as valid evidence through some consideration, applicants first submit written evidence in the form of derivatives marriage book, the second discovery of the facts were found either in court of evidence written or witness evidence to know that marriage is indeed real and is legitimate because it has met the terms and harmonious marriage. And the consideration of the latter is for the benefit of the applicant, the judge emphasizes expediency rather than justice and the rule of law (legal purposes), that the applicant needs to apply for '*isbat nikah*' just to take care of a retired widow.

Therefore, the authors are interested in doing research related to the receipt of testimony in the case '*isbat nikah*' in the Religious Court Malang. So from this study will be answered concerns about testimonium de auditu can or can not be used as evidence that ties the marital settlement confirmation requests and also what are the considerations judge granted '*isbat nikah*' with de auditu testimony.

B. Problem Formulation

1. Are testimonium de auditu evidence can be used in the completion of the request of '*isbat nikah*' in the Religious Malang.

2. What is the legal basis and the consideration of Judge granted the '*isbat nikah*' request number 69/Pdt.P/2012/PA.Malang marriage.

C. Research Methods

1. Type of Research

This research is normative research, because the research is in its implementation is based on a logical and coherent thinking by examining a normative Determination Number: 69/Pdt.P/2012/PA.Mlg and legislation in force and no relation between the other law No. 1 of 1974 concerning marriage and Herzeine Indonesia Reglemen (HIR) which is the legal basis under the law of civil procedure and evidence related to the issues to be discussed.

2. Research approach

With respect to the type of research is normative, then the research approach used is a statutory approach (statue approach), which is related to the civil procedural law and rules of evidence in civil procedure such as HIR, Act No. 1 of 1974 on Marriage . That is because that will be examined are the various rules of law relating to evidentiary testimony in the case of '*isbat nikah*' with the proving testimonium de auditu number: 69/Pdt.P/2012/PA.Mlg.

3. Data

In this study only consisted of primary data are divided into 3 legal materials, such as:

1. Primary legal materials, the primary legal materials consisting of:
 - a. Determination of the Religious Court Malang Number: 69/Pdt.P/2012/PA.Mlg.
 - b. Law No. 1 of 1974 on Marriage.
 - c. HIR (Het Herziene Indonesia Reglemen)
2. Secondary legal materials, in example materials that provide an explanation for the primary legal materials, such as:
 - a. Presidential Instruction No. 1 Year 1991 About Compilation of Islamic Law.

- b. Government Regulation Number 9 Year 1975 On the implementation of Law No. 1 of 1974 About Marriage.
3. Tertiary legal materials, ie materials that provide guidance and explanation of the legal materials primary and secondary legal materials, such as dictionaries (law) and legal encyclopedias.
4. Data Round Up Techniques (Legal Materials)
Data round up techniques (material law) is used to study literature searches and to collect and examine or browse the primary legal materials, legal materials and secondary and tertiary legal materials.
5. Data Analysis Techniques (Legal Materials)
Data analysis techniques in the research done by breaking the law or provisions relating to evidentiary testimony in the Civil Procedure Code and then conduct an analysis of the Religious Court Determination Number 69/Pdt.P/2012/PA.Mlg Malang. Qualitative descriptive manner, which is to describe and analyze the contents of the regulations governing the application for confirmation evidentiary testimony that marriage is in the Religious Decision Number 69/Pdt.P/2012/PA.Mlg Malang.

D. Analysis

1. Testimonium De Auditu As Evidence '*Isbat Nikah*' Request

Testimony de auditu can also be called as a witness Hearsay. Hearsay hear comes from the word that means to hear and say that means to say. Therefore, the term literally means Hearsay hearing from others. So not hear its own facts from people who say that is also called as indirect evidence. Since hearing of the words of others, then the witness de auditu similar to the designation report, gossip or rumor.

Civil Code prohibits using the testimony as evidence de auditu full. It is stipulated in Article 1907 paragraph 1 and Article 171 of the HIR. Statements of witnesses who heard from someone else is not guaranteed truth, therefore his testimony could not be used as evidence.

Terms testimony de auditu which in principle can not be accepted as evidence in practice many exceptions occur. Testimony de auditu can serve as the basis for the judge to set conjecture. Because as a witness testimonium de auditu is of no value but the judges are not necessarily forbidden to accept it.

From the above, it can be concluded that in certain cases the general provisions contained in Article 171 and the HIR is not binding and ruled out for the benefit and welfare of the applicant in the completion of the '*isbat nikah*' request.

2. The legal basis and the consideration of the judge granted '*isbat nikah*' request.

To establish a case law judge gave consideration to incorporate the provisions of the existing legislation, the facts and legal proceedings are still living in the community. Because the judge is the most important element in law enforcement that is able to interpret, amplify and consider regulations that are applicable to the development needs of the community, in order to create legal certainty in the community.

Based on the above discussion regarding the basis and consideration of the Judge granted the request of '*isbat nikah*' with Register Number: 69/Pdt.P/2012/PA.Mlg, that is:

- a. In specific terms, which are exceptional circumstances which justify or recognize testimonium de auditu as evidence. One reason that can be justified exceptional, if the main witness experience, see, and hear their own death, and before he died explaining everything to someone that event. And the events in question can not be revealed without any explanation from someone who knows, then in such a case is exceptional is justified testimonium de auditu as evidence.

Acceptance testimonium de auditu as evidence in exceptional, has justified the Indonesian judicial jurisprudence. One of these Supreme Court No.. 239 K / Sip / 1 973. In this case, district court,

and supreme court de auditu justify testimony as evidence in consideration of which reads:

"That the witnesses above generally is according to the message, but it must be considered that almost all events or actions or events that occurred before the law does not have the letter, but was based on hereditary message, while witnesses who directly face action law was once no longer expected life right now, so in that case the hereditary message is what can be expected as the information and knowledge by their own judge Assembly messages like this by *Batak* society is generally considered valid and true ":

1. in the meantime should be noted about from whom the message was received and the person who gave the information that he had received the message;
2. therefore, it is assessed in terms of witnesses it.

Noticing the above decision, the factors relied upon to justify testimonium de auditu as evidence is:

1. witnesses directly involved in the events or actions that sued the law no longer exists because of all the dead, while the incident or act of law is not written in the form of a letter;
2. testimony provided by witnesses de auditu was a message from the perpetrator or the person who looks in the event of a dispute or legal action.

In this decision, supreme court justify testimonium de auditu is exceptional as evidence of eligible material, if the witness gives testimony on oath. Statement was accepted as evidence that stand-alone reaches the threshold of proof without any assistance other evidence if the witness de auditu consists of several people.

- b. Testimonium de auditu not be used as direct evidence but the testimony of de auditu constructed as evidence foreboding, with an objective and rational considerations, and conjecture it can be used

as a basis to prove something. As seen on Supreme Court Decision Number 308 K/Pdt/1959. According to this decision:

1. *testimonium de auditu* not be used as direct evidence,
2. but the testimony, can be applied as evidence presupposition (*vermoeden*), and conjecture that can be used as a basis to prove something.

Indeed, this decision to stick to the general rule prohibiting *de auditu* testimony as evidence. To avoid the ban, the testimony was not considered as evidence of witnesses, but constructed a foreboding evidence (*vermoeden*).

- c. Justifying *testimonium de auditu* as evidence to supplement the minimum *unus testis testis nullus* given a witness. In the Supreme Court. K/Sip/1983 818 on 13 August, 1984, stated that *testimonium de auditu* as information that can be used to strengthen the common witness. In this case a witness who directly participated in buying and selling only the first witness, while the second and third only witness qualified as *de auditu*, but even so it turned out in the trial that the information they convey is the result of knowledge directly derived from the defendant himself. Based on these facts the Supreme Court found their testimony could be used as evidence to corroborate the testimony of a witness.

Legal considerations is the soul and essence of the decision. Consideration unbiased analysis, arguments, opinions or conclusions of law from the judge to investigate the case.² After knowing the basis determined by the Judge as noted above, the researchers then attempted to understand the legal considerations in determining application for confirmation judge this marriage. Discussion of Justice judgment in determining of '*isbat nikah*'

² Yahya Harahap, Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan dan Putusan Pengadilan, Jakarta, Sinar Grafika.2005. Page 809

request will be specified based on any petition that requested by the applicant:

1. In the first petition applicant asks judge to grant her request. To determine the first petition, the judge first consider the other petitions. When the applicant submitted evidence to the granting of the first petition, the applicant be able to prove the arguments of the petition. Because the evidence of the applicant can be matched to the original and has the power.
2. In the second petition applicant appealed to the judges to declare that his marriage to Zainal Arifin bin Hasan (*alm*) is valid.

In this marriage confirmation petition Judge found some legal facts based on the reasons presented by the Petitioner and the descriptions given by witnesses, among others:

- That the applicant and Zainal Arifin bin Hasan (*alm*) was the first legitimate conjugal married on July 22, 1951 to parents marriage guardian biological male applicant named Hussein, a dowry of money and the two witnesses named Ibnu and Zakki.
- That the applicant with Zainal Arifin bin Hasan (*alm*) has been given the 7 (seven) children.
- That the applicant and Zainal Arifin bin Hasan (*alm*) had never divorced.
- The purpose of marriage is to obtain confirmation quotes Marriage Act filing requirements needed in PT.Taspen.
- That the applicant and Zainal Arifin bin Hasan (*alm*) there is no obstacle Personality 'to marry.

Based on the above facts, the judges may conclude that the petition has been proven to have fulfilled her legal requirement marriage according to Islamic law as defined in Article 14 Compilation of Islamic Law, Presidential Decree No. 1 of 1991

which is to perform the marriage shall exist a) bridegroom, b) bride, c) *Wali Nikah*, d) Two witnesses, and e) *Ijab qabul*.

Besides, the judges also agreed with the contents of the book Baghiyatul Musytarsyidin page 209 and the Hadiths of the Prophet Muhammad, as the legal considerations in the application for confirmation of wedlock, which means:

"Then if there has been evidence of witnesses in accordance with the recognition of the marriage, the marriage remains".

"There is no marriage except with a *wali* and two witnesses were fair".

3. In the third Petition applicant appealed to the judge to set the application fee by law.

According to Article 89 paragraph (1) of Law No. 7 of 1989 as amended by Act No. 3 of 2006 and Act No. 50 of 2009 on Judicial religion, court fees should be charged to the applicant.

Testimony de auditu not automatically be rejected as evidence. The right attitude and a more moderate is to receive first, then considered by analyzing whether there are exceptional basis to take in consideration the very objective and rational, the extent to which the quality and value of the inherent strength of the proof de auditu witness it.³ If it is in a state / conditional and there is no basis to the exceptional quality of evidence that has been tested and measured, why get rid of it.

This is where the required accuracy and intelligence to judges in assessing the evidence (witnesses) to give a fair judgment or determination. The judge in the judicial process should not be played identifies truth and justice together with formulation of legislation despite the judge limited the interpretation or construction of the law of procedure done. Because the law itself should at least

³ M. Yahya Harahap, Hukum Acara Perdata, Sinar Grafika, 2005. Jakarta. Page 663

include three values identity, the legal justice (gerechtigheid), the benefit of the law (zwechmatigheid / doelmatigheid), and the rule of law (rechtmatigheid). So the legal framework to analyze the facts with the advanced aspects of philosophical and sociological aspects rather than its formal juridical sometimes be an alternative to a Judge.

In the determination of the '*isbat nikah*' request No. 69/Pdt.P/2012/PA.Mlg, the author will analyze each of any injunction judge following stipulation:

First, the grant applicant. Applicant has filed a petition in writing which has been equipped with reinforcing evidence arguments in each petition, namely:

1. Evidence papers, in the form of a certificate from KUA Sub-district Paron-Ngawi Regency district No. Kk.13.21.2 / Pw.01/250/2012 on 11th April 2012, that the marriage has not been recorded (P.1), photocopy of ID card applicant 1 (P.2), copy of family card (KK) on behalf of Zainal Arifin issued on 15th December, 2006 (P.3), copy of marriage derivative Letter issued by the military command of UB Number: 34/84/581 (P. 4). Photocopy copy *ta'lik* divorce, marriage certificate copy derivative of the Office of Marriage Paron Sub-district and Ngawi regency district, photocopy of marriage certificate from the head of the regional traffic (DLLT-520) Number: 006 812 dated on 9th Juli, 1951 (P.6), a copy of the letters have been matched and stamped in accordance with the original receipt is given P2, P3, P4, P5, P6, P7 P1 evidence while the original certificate.
2. Evidence of a witness-namely Umar ibin Nazar, age 60 years, muslims, private employment, residence on Jl. Coklat RT. 007 RW001. No.523 Dinoyo Lowokwaru Malang district, and Yusuf bin Ahmad, age 51 years, muslims, private employment, residence on Jl.Coklat RT.007 RW.001. No. 537 Dinoyo Lowokwaru Malang District.

From the evidence submitted by the applicant, it is known that the applicant got married at the age of 17 years. Age applicant today is 78 years, while the witnesses presented by the applicant at the time now is 60 years old and 51 years old. The first witness that Umar bin Nazar, was 18 years younger than

the applicant, while a second witness that Yusuf bin Ahmad, 27 years younger than the applicant. So it can be concluded that at the time the applicant establish a covenant marriage, the unborn child witness, the witness did not see the applicant's contract of marriage, while the law of civil procedure material witness is qualified to explain what is seen, heard, and he experienced his own, unknown causes he knows the event, not an opinion or conclusion the witness himself, does not correspond to each other, not contrary to reason.⁴

It can be seen that the witnesses presented by the applicant is a *de auditu* witness. In principle, under Indonesian law *de auditu* witness does not have the power as a means of witness evidence. In terms of Article 171 HIR also stated that in general a witness must give an account of the things he saw, heard and experienced, and not that he knew from the testimony of others.

Based on writer, the judges in the confirmation grant applicant has the right of marriage, although witnesses presented by the applicant is a witness *de auditu*, but there is other evidence that the written evidence as stated above, from the written evidence it is known that the marriage applicants with her husband happens to be true but because the marriage made before 1974, then the marriage is not to have a marriage certificate, because it is not listed as a view of Article 2, paragraph 1 and 2 of Law No. 1 of 1974.

Second, in the determination of the Religious Court Malang Number: 69/Pdt.P/2012/PA.Mlg judge set her legal marriage between the applicant (Siti Maryam binti Hussein with Zainal Arifin bin Hasan (*Alm*) was held on July 22, 1951 in the Sub district Paron-Ngawi regency district, which the judge is a marriage of the applicant has qualified both valid marriage under Islamic law and legislation in force. According to the writer, in this ruling, the judge has given the setting is right, based on the facts found from the evidence presented in court the applicant, whether written evidence or witness evidence can be seen that marriage is indeed occurs, and it is legitimate because it has met the terms, there had been bridegroom and a bride, two witnesses, guardians, consent and *ijab qabul*, as well as the purpose of Article 14 Compilation of Islamic Law.

⁴ Mukti Arto, *Praktek Perkara Perdata*, Yogyakarta, Pustaka Pelajar. 2008. Page 166

Third, ordered the applicant to register the marriage in the marriage register book at the office of Religious Affairs (*KUA*) Lowokwaru Malang District. Commands judges to make registration of marriages is to establish the applicant's marriage. According to the authors, the command to register the marriage precisely because marriage has been declared invalid, then that marriage has the force of law, it should be listed so the marriage applicant and the applicant's legal status in the office can take care retirement PT.Taspen. after the author make an interview with one of the judges who decide such determination, the judge stated that the purpose why applicant did '*isbat nikah*' is just only to take care of retired widows, and to bring witnesses who saw the procession of the marriage covenant is not there, the witnesses are dead, so that can be presented only witness de auditu. And keep in mind that the purpose of the law, there are three kinds of benefits, fairness and certainty. In this case the judges put forward expediency, rather than other legal purpose. Since the three objectives of the law can not be completely achieved.⁵

Fourth, the case charge to the applicant. In the ruling, the latter point, the judge also gave the correct determination according to law, because establishment according to what is on the provision of Article 89 paragraph (1) of Act No. 7 of 1989, which states that "marriage in the court fees charged to the plaintiff or applicant. "Determination of the Religious Court Malang is less precise, because the true existence of the witness testimony is beyond the category of de auditu witnesses prescribed by law, but to react to it is not necessarily reject that there is no value at all, because in certain circumstances may be accepted as evidence by considering the extent to which the quality and probative value of the testimony given by the witness de auditu. Therefore, in this case the provisions of Article 171 paragraph (1) HIR is no longer binding and should be set aside for the benefit and welfare of the applicant.

E. Conclusion

- a. Malang religious court granted the application for decision of '*isbat nikah*'
Number: 69/Pdt.P/2012/PA/Mlg under Article 171 HIR normative

⁵ Munasik, interview on 14 Desember 2012

juridical appropriate because it found the facts in the court stating that the marriage did take place and was illegal because it had qualified. In certain circumstances the provisions of Article 171 HIR is not binding and can be ruled out by considering the quality of evidentiary value given by the witness de auditu.

- b. Determination of religious court Malang number: 69/Pdt.P/2012/PA.Mlg to establish the validity of the marriage between the petitioner Zainal Arifin (*Alm*) in accordance with the rules of law, and supported by the jurisprudence of the Supreme Court No. K/Pdt/1959 308 dated on 11th November 1959. With regard consideration of legal values in society, religious principles for the benefit of the applicant.

Suggestion

Based on the conclusions that have been formulated, the writer tries to give advice that could be an alternative solution for Religion Court and all parties interested in solving problems related to the evidentiary testimony de auditu.

As for suggestions that the writer suggested, among other things:

- a. For Academics

Academics should be more channel owned science, especially in the field of legal science to society through socialization, it is intended to allow the public to know the things to do when trying to proceedings in the Court, particularly in terms of proof.

- b. For the Government

Should the government as an institution and the Parliament (Law makers) were able to refine and reassess or include arrangements regarding verification testimonium de Audit.

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